to a fair return on the investment only, the franchise might be deprived of all value. If this be the position of the Court, it practically amounts to a repudiation of the notion that a franchise is property at all, or, at least, is to be considered in rate regulation. It is to be noted in this connection, that in another case[20] involving a rate statute, decided on the same day, no allowance for franchise value was included in the appraisement of the company's property.

THE THEORY OF THE JUDICIAL DECISION AS INFLUENCED BY THE EFFECT OF AN OVERRULING DECISION.—Blackstone, maintaining that judges do not make, but simply find the law, asserted that a decision never creates a new rule of law but merely embodies a rule or custom which always existed.[1] A resulting corollary of this theory is that a decision is not the law, but merely evidence of it, and an overruling decision does not abrogate or change the law of the overruled, but authoritatively asserts that it never existed. It necessarily follows that an overruling decision, unlike a repealing statute, must have a retrospective operation. Austin and later writers, instancing examples of judicial legislation, vigorously criticized Blackstone's theory as artificial and fictitious.[2] Although Jessel, M. R., admitted that the equity judges had from time to time invented the rules of equity,[3] the common law judges have steadfastly reiterated the Blackstone theory.[4] But its consequence, that an overruling decision must operate retrospectively, by reason of hardship and mischief in the impairment of contract and property rights acquired in reliance on the earlier decision, has had these results: (1) it has furnished compelling reason for adherence to the doctrine of *stare decisis*;[5] (2) it has led courts when constrained to overrule their decisions, while professing allegiance to the orthodox Blackstone theory, to depart widely from a logical acceptance of it.

Equity courts have, under some circumstances, refused to give common law decisions retrospective effect; for example, it has been held that an overruling decision shall not retroact so as to reopen settlements made in reliance on the decision at the time of the settlements.[6] Perhaps the earliest evidence of the refusal of courts in general to accept unqualifiedly the orthodox theory is the long established rule that the rights of *bona fide* purchasers at a judicial sale shall not be affected by the retrospective operation of the reversal on appeal or writ of error of the equitable decree or legal judgment under which they purchased.[7] Some courts confine the exception to cases of judicial sales,[8] others extend it to the case of a purchaser from a successful party to the first hearing before the citation of the writ of error, as distinguished from the appeal.[9] On the authority of

[20]Mayor *et al. v.* Knoxville Water Co. (1909) Supr. Ct., Oct. Term, 1908, No. 17. See also, opinion of Hough, J., in Consol. Gas Co. *v.* City of N. Y. (1907), 157 Fed. 849, 872 *et seq.*

[1]1 Bl. Com. 70.

[2]Austin, Jurisprudence 778; Salmond, Theory of Judicial Precedents, 16 L. Quart. Rev. 376; Thayer, Judicial Legislation, 5 Harv. L. Rev. 172.

[3]In re Hallett's Estate (1879) 13 Ch. Div. 676, 710.

[4]Norway Plain Co. *v.* Boston & Me. R. R. (1854) 1 Gray 263, 267.

[5]Sharswood, J., in Ram, Legal Judgments 423.

[6]Lyon *v.* Richmond (1816) 2 Johns. Ch. 51.

[7]Voorhees *v.* Bk. of U. S. (1836) 10 Pet. 449, 475.

[8]Harle *v.* Langdon's Heirs (1883) 60 Tex. 555; Delano *v.* Wilde (1858) 11 Gray 17.

[9]Lessee of Taylor *v.* Boyd (1828) 3 Ohio 337; Macklin *v.* Allenburg (1889) 100 Mo. 337.

an early Supreme Court case,[10] a Florida decision,[11] in refusing to compel restitution by an attorney who was paid from the proceeds of a judgment later reversed, still further extended the rule, and put it in the general form that, as to third parties, whatever has been done while the judgment remains in full force is unaffected by reversal. Two early Pennsylvania cases, *Menges* v. *Dentler*[12] and *Geddes* v. *Brown*,[13] bespeak a wider departure from the orthodox theory. The first proceeds avowedly on equitable principles, and, since it is a case of protecting one who claims under the party to the overruled decision, might have been put on the ground of later Indiana[14] and Minnesota[15] cases which, while supporting the orthodox theory, make an exception in favor of parties to the overruled case and their privies, presumably on the principle of *res adjudicata*. The second, however, not an action of equity, and where neither party claimed under the parties to the overruled decision, vigorously maintains that parties should be entitled to rely on decisions existing at the time of the transactions.

This idea has been developed by the Federal Supreme Court. That court, as was settled in *Gelpcke* v. *Dubuque*,[16] will not follow the latest decision of a state court construing a statute, when the decision overruled a former decision upon which the parties relied in making the contract. That this rule is not merely a modification of the rule of comity, but, as pointed out by Miller, J., dissenting, in *Gelpcke* v. *Dubuque*, [16] a flat contradiction of the orthodox rule, impeaching the theory of a decision, appears from *Douglass* v. *Co. of Pike*,[17] where it was said that such a change of judicial construction should have the same effect as a legislative amendment, that is, operate only prospectively. The overruled decision is not mere erroneous evidence of law, but valid law entering into the obligation of contracts, which should not be impaired by a change of decision. But a judicial decision impairing the obligation of contract is not within the constitutional prohibition.[18] Hence, a writ of error to a State court will not issue, solely because of the overruling decision. If, however, subsequent to decisions interpreting the statute, a second statute is passed which would impair rights under the earlier statute and decisions, and the State court reverses those decisions, the Supreme Court will take jurisdiction and hold the statute unconstitutional on the ground that the overruling decision shall not retroact to alter the rights of parties who relied upon the overruled.[19] It was on the fact of the existence of a subsequent statute that jurisdiction was taken in *Muhlker* v. *Harlem R. R. Co.*[20] But of greater significance is the final extension in this case, of the rule of *Gelpcke* v. *Dubuque*[16] to situations where the overruled law consists not

[10]Bk. of U. S. *v.* Bk. of Wash. (1832) 6 Pet. 8.
[11]Fla. Centl. R. R. Co. *v.* Bisbee (1881) 18 Fla. 60.
[12](1859) 33 Pa. 495.
[13](1863) 5 Phila. 180.
[14]Hibbitts *v.* Jack (1884) 97 Ind. 570, 578.
[15]Bradshaw *v.* Duluth Mill Co. (1892) 52 Minn. 59.
[16](1863) 1 Wall. 175. See the controversy between the Supreme Court and the courts of Iowa following this case. R. R. Co. *v.* Rock (1866) 4 Wall. 177; McClure *v.* Owen (1868) 26 Ia. 243; R. R. Co. *v.* McClure (1870) 10 Wall. 511.
[17](1879) 101 U. S. 677, 687.
[18]R. R. Co. *v.* Rock, *supra*.
[19]Central Land Co. *v.* Laidley (1894) 159 U. S. 109 (*semble*.).
[20](1905) 197 U. S. 544; see Larremore, 22 Harv. L. Rev. 182.

of a statute and decisions upon it, but entirely of decisions, relied upon by the parties.

The rule in *Gelpcke* v. *Dubuque*[16] has been adopted by some of the State courts,[21] but rejected by others.[22] Its extension in *Muhlker* v. *Harlem R. R. Co.*[19] has received some support in late State court decisions. The first of three North Carolina decisions refused to allow a person accused of crime to be prejudiced by the retroaction of an overruling decision;[23] the second, without reference to the statutory construction exception, similarly protected contract rights;[24] the last, however, made in the present year, characterized the first two as isolated exceptions made in cases of special hardship and returned to an adherence to the orthodox theory as qualified by the statutory construction exception.[25] On the other hand, a recent Pennsylvania case, involving a mortgagee who had taken a mortgage on the faith of earlier judicial rules of construction of wills, *Hood* v. *Society to Protect Children* (Pa. 1908) 70 Atl. 845, while admitting that on principle decisions must retroact, refuses to apply the principle so as to prejudice the rights of the mortgagee, on the ground that the intention of the testator should not be defeated by a subsequent change of decision—the most extreme instance of the tendency to deny the orthodox theory of the common law.

It would seem that the reasons of justice, convenience, and sound business policy which have led the courts to breach the fictitious Blackstone theory with exceptions, might well justify them in consistently repudiating it, to the extent at least of guaranteeing to persons who have acquired property and contract rights in reliance on authoritative decisions of the highest courts, the same security against the retroaction of an overruling decision as they at present enjoy in the case of a repealing statute.

THE ELEVENTH AMENDMENT AND STATE OWNERSHIP.—In a recent case, *Murray* v. *Distilling Co.* (1908) 164 Fed. 1, in the Circuit Court of Appeals, the theory was enunciated that, if a State undertakes a private business, it is not entitled to the protection of the Eleventh Amendment in suits on obligations incurred in that business. The doctrine that a sovereign so engaged is not exempt has been judicially suggested,[1] but never decided. It was strongly urged in *The Parlemente Belge*[2] that the English courts might render a decree against a vessel owned by the King of Belgium carrying on a private business, but the court found the vessel was performing a public function. Chief Justice Marshall apparently decided *United States Bank* v. *Planters' Bank*[3] on the ground that. "when a government becomes the partner in any trading company, it divests itself, so far as concerns the transactions of that company of its sovereign character and takes that of a private citizen." But the case is usually construed to stand for no more than that a suit against a corporation is not one against the stockholder and therefore not one against the State

[21]Ray *v.* Natural Gas Co. (1890) 138 Penn. St. 576; Falconer *v.* Simmons (1902) 51 W. Va. 172; Farrior *v.* New Eng. etc. Co. (1891) 92 Ala. 176.
[22]Storrie *v.* Cortes (1896) 90 Tex. 283.
[23]State *v.* Bell (1904) 136 N. C. 674.
[24]Hill *v.* Brown (1907) 144 N. C. 117.
[25]Mason *v.* Nelson (N. C. 1908) 62 S. E. 625.

[1]In the Matter of Charkieh (1873) L. R. 8 Q. B. 197.
[2](1880) L. R. 5 Prob. Div. 197.
[3](1824) 9 Wheat. 904.